

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-213643.2

DATE: July 12, 1984

MATTER OF: Detroit Broach and Machine--
Reconsideration

DIGEST:

1. Where record indicates that protester reasonably believed that it would be given an opportunity to submit a proposal for a requirement which the agency was conducting sole-source negotiations, protester was justified in awaiting final agency decision concerning its participation in the procurement and protest filed in a timely manner after agency notification will be considered.
2. Where the procuring agency establishes reasonable basis for requirement which is alleged to be unduly restrictive, protester's disagreement with agency's conclusion does not establish that agency determination was unreasonable.
3. Sole-source award is justified where record indicates that only one firm is capable of fulfilling agency's needs.
4. Buy American Act does not prohibit sole-source award to foreign-based firm.
5. Allegation that contract should be awarded to domestic firm due to national security factors is not for consideration under GAO Bid Protest Procedures.

Detroit Broach and Machine (DBM) requests reconsideration of our decision in Detroit Broach and Machine, B-213643, Jan. 5, 1984, 84-1 C.P.D. ¶ 55, in which we dismissed as untimely filed DBM's protest concerning a sole-source award to Rudel Machinery Co., the authorized representative of the Swiss Industrial Corporation (SIG) under solicitation No. DAAA22-83-R-9009 issued by the United States Army Watervliet Arsenal (Army) for multi-product rifling machines. We dismissed DBM's initial protest since we found that it was not filed prior to the actual closing date for receipt of proposals.

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On the basis of the materials presented in the reconsideration request, we have considered the merits of the protest. As discussed below, however, we deny the protest.

Ordinarily, when a procuring agency publishes in the Commerce Business Daily a synopsis indicating that sole-source negotiations are being conducted, protesters are charged with constructive notice of the announcement. Where the synopsis contains a closing date, any protest of the sole-source decision must be filed prior to that date. Micro-Mil, Inc., B-202703, May 1, 1981, 81-1 C.P.D. ¶ 335. However, after reviewing the additional material submitted, we find that there is sufficient evidence which supports DBM's claim that it reasonably believed that the Army would permit DBM to submit a proposal for this requirement. Accordingly, we are of the view that DBM was justified in awaiting the final decision of the Army regarding its participation in this procurement prior to protesting. Since DBM's protest was filed in a timely manner after being notified by the Army that it would not be permitted to submit a proposal, we will review the merits of DBM's protest.

DBM argues that the Army's decision to restrict this procurement to only experienced manufacturers of this type of machine is unduly restrictive since DBM possesses the necessary expertise and resources to build a multipurpose rifling machine. Also, DBM contends that the Army made no attempt to determine if alternate sources existed and that, as a result, the Army's determination to award a sole-source contract cannot be upheld. In addition, DBM alleges that the Army disregarded the provisions of the Buy American Act and the Small Business Act. Finally, DBM argues that by awarding to SIG, the Army failed to maximize competition for future procurements and that the Army should have awarded this contract to a domestic source due to national security considerations.

The Army states that a multipurpose rifling machine is required to satisfy the Watervliet Arsenal's current and future production needs. Unlike the machines currently in use, a multipurpose machine can be easily adapted from one rifle configuration to another, permitting the Army to maintain a much smaller and less costly inventory. The Army indicates that the versatility of the machines is derived from a series of highly complex adjusting mechanisms, which, combined with the Arsenal's precision

requirements, present a series of difficult technical problems which are not easily overcome in the manufacturing process. This factor, coupled with the Army's urgent need for the machines and the difficulties encountered by the arsenal in prior procurements of far simpler rifling machines, caused the Army to include an experience clause in the solicitation in order to insure that the Army would receive a proven product fully capable of meeting the Army's needs.

The Army states that there are no domestic manufacturers of this type of machine and that foreign cannon manufacturers that were visited, all employed the rifling machines manufactured by SIG. While the Army recognizes that DBM, as well as other companies, could perhaps build a multipurpose rifling machine, the Army requires a proven product. Since SIG is the only firm capable of providing a proven machine, the Army argues that the sole-source award is justified.

Initially, we note that the procuring agency has the primary responsibility for determining its minimum needs and for drafting requirements which reflect those needs. Romar Consultants, Inc., B-206489, Oct. 15, 1982, 82-2 C.P.D. ¶ 339. It is the contracting agency which is most familiar with the conditions under which the supplies or services will be used, and our standard for reviewing protests challenging agency requirements has been fashioned to take this fact into account. Specifically, our Office will not question agencies' decisions concerning the agencies' needs or the best methods of accommodating those needs absent clear evidence that those decisions are arbitrary or otherwise unreasonable. Duroyd Manufacturing Company, B-213046, Dec. 27, 1983, 84-1 C.P.D. ¶ 28.

Furthermore, while agencies should formulate their needs so as to maximize competition, burdensome requirements are not unreasonable, so long as they reflect the government's legitimate minimum needs. Educational Media Division, Inc., B-193501, March 27, 1979, 79-1 C.P.D. ¶ 204. While we subject sole-source awards to close scrutiny, we have recognized that noncompetitive awards may be made where the minimum needs of the government can be satisfied by only one firm which could reasonably be expected to produce the required item without undue technical risk within the required timeframe. Bird Electronics Corporation, B-205155, June 2, 1982, 82-1 C.P.D. ¶ 519.

In our view, DBM has not demonstrated that the Army's determination to procure a proven product from an experienced manufacturer is clearly unreasonable. Although DBM believes that it could build a multipurpose rifling machine, the Army has decided that the technical risk in such an undertaking is too great. Given the complexity of the machines, the Army's stringent precision requirements and the urgent need that the Arsenal has for the machines, we find no basis to question the Army's judgment in this regard.

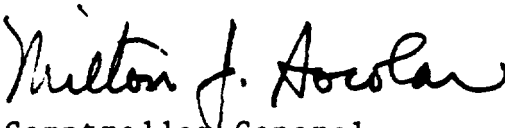
Concerning the propriety of the sole-source award, there is no evidence in the record which contradicts the Army's assertion that only SIG currently manufactures a multipurpose rifling machine. DBM has acknowledged that it has never built such a machine and DBM has submitted no evidence which indicates that there are other firms manufacturing multipurpose rifling machines. Accordingly, we do not find the sole-source determination to be improper.

With respect to DBM's remaining contentions, we find them also to be without merit. The Buy American Act does not provide a basis for challenging a sole-source procurement since it does not prohibit the purchase of foreign products, but merely posits a price comparison between competing offers, which is not possible when only one offer is present. Design Pak, Inc., B-212579, Sept. 16, 1983, 83-2 C.P.D. ¶ 336. Although the Small Business Act, 15 U.S.C. § 637, et seq. (1982), evidences a congressional policy that some procurements be set aside for small business, whether a particular procurement should be set aside is up to the discretion of the contracting agency. Interior Steel Equipment, Co., B-212253, Nov. 14, 1983, 83-2 C.P.D. ¶ 556. Furthermore, DBM's allegation that the procurement was structured in a manner which does not maximize future competition provides no basis for relief. The propriety of a particular procurement is judged on whether the government's actions in that procurement were reasonable and, in this case, we have found the sole-source award to be proper. See Memorex Corporation, B-212660, Feb. 7, 1984, 84-1 C.P.D. ¶ 153.

Finally, DBM's allegation that an award should have been made to a domestic firm due to national security factors is not for consideration under our Bid Protest Procedures. E-Systems, B-206209, June 4, 1982, 82-1 C.P.D. ¶ 533. Our review of bid protests is to determine

whether procuring agencies adhere to the policies and procedures prescribed by existing laws and regulations and we are unaware of any legal requirement which would restrict the award of this contract to a United States firm.

.The protest is denied.


Acting Comptroller General
of the United States